

NOT FOR PUBLICATION

AUG 16 2007

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	AZ-06-1346-AKPa
)		
SPECTRUM GOLF, INC.,)	Bk. No.	02-15894
)		
)	Adv. No.	02-01422
Debtor.)		
_____)		
ROBERT A. CHITI,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
SPECTRUM GOLF, INC.,)		
)		
)		
Appellee.)		
_____)		

Argued and Submitted on July 26, 2007
at Phoenix, Arizona

Filed - August 16, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Before: AHART,** KLEIN and PAPPAS, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1.

**Hon. Alan M. Ahart, U.S. Bankruptcy Judge for the Central
District of California, sitting by designation.

This is an appeal from an Order Incorporating Memorandum Decision entered on September 22, 2006, which incorporated a Memorandum Decision dated September 22, 2006 and awarded \$22,000 in punitive damages against Appellant Robert A. Chiti ("Appellant") and in favor of Appellee Spectrum Golf, Inc. ("Appellee"). In addition, pursuant to a prior Memorandum Decision dated February 21, 2006, the bankruptcy court awarded \$5,500 in compensatory damages for conversion and breach of fiduciary duty against Appellant and in favor Appellee. We

REVERSE.

I. FACTS

During the first part of 2002, Appellant was a general sales manager for Appellee. As part of his employment, Appellant generated a business plan (the "Business Plan"), sought investors, and "was responsible for running the day-to-day operations, including, but not limited to, setting the strategic direction of the company and ensuring that Golf Switch would be the 'number one online tee-time provider in North America.'" Tr. 8/15/05 at pgs. 33-34 and Memo. Dec. 2/21/06 at p. 12. Golf Switch, one of three lines of business of Appellee, developed software to assist the golf industry in determining tee time availability at various golf courses. At the end of March 2002, Appellant ordered Fiesta Bowl tickets and authorized that they be charged to Appellee's corporate credit card. On June 7, 2002, Appellant was terminated from his employment with Appellee. The tickets appeared as a charge on the June 2002 credit card statement of Appellee. On June 12, 2002, Appellee informed Appellant that the amount charged to Appellee's credit card account for the tickets would be taken

1 out of Appellant's final check.

2 On July 24, 2002, Appellant filed a civil complaint against
3 Appellee in the Scottsdale Justice Court alleging that Appellee
4 had issued a check to Appellant for \$2,159.30 but breached an
5 employment termination agreement by failing to pay the balance of
6 six weeks of compensation. The complaint requested damages of
7 \$9,379.16,¹ including appropriate taxes, plus interest of
8 approximately \$62. Appellant asserts that Appellant did not learn
9 what amounts had been withheld from his compensation until his
10 attorney happened to pull the file from the Scottsdale Justice
11 Court and saw the documentation filed by Appellee. The file
12 included a copy of a letter mailed to the Scottsdale Justice
13 Court, where Damian Greco ("Greco"), Appellee's president and CEO,
14 stated that overall Appellant received \$11,076.93 gross payroll as
15 the balance of his severance and that this amount was reduced by
16 \$5,500 for the Fiesta Bowl tickets. The record also includes
17 copies of three direct deposit stubs to Appellant's account, all
18 dated July 26, 2002, which reflect that approximately \$1,833.33
19 was deducted from each of the three direct deposits, totaling
20 \$5,500. The "net" pay shown on each of the three deposits was
21 only \$55.72, \$55.72, and \$55.75, respectively. On October 1,
22 2002, since Appellee failed to appear or to respond to mediation,
23 a default judgment was entered against Appellee for \$9,526.16 by
24 the Scottsdale Justice Court.

25

26

27 ¹This amount apparently represents six weeks of compensation
28 totaling \$11,076.93 plus taxes of \$461.53 less the \$2,159.30
check.

1 On October 7, 2002, Appellee filed its Chapter 11² petition.
2 Two days later Appellant caused to serve a Writ of Garnishment in
3 an effort to collect his default judgment against Appellee. On
4 December 15, 2002, the Fiesta Bowl tickets became available.
5 Appellee denied any responsibility to pick up the tickets and
6 indicated it did not want the tickets. Appellant found out that
7 towards the end of the period, Appellee had not claimed the
8 tickets and therefore Appellant took them. Appellant gave some of
9 the tickets away and sold the rest for \$1,600, which he kept. He
10 justifies retention of these monies because he said Appellee had
11 withheld funds from his salary.

12 On December 30, 2002, Appellee filed a complaint in the
13 bankruptcy court against Appellant for breach of fiduciary duty
14 and usurpation of corporate opportunity (the "Complaint"). The
15 Complaint alleged that Appellant breached his fiduciary duty to
16 Appellee by disclosing the Business Plan to third parties and, as
17 a result of that breach, Appellee was damaged in excess of
18 \$1 million. The Complaint further alleged that Appellant usurped
19 Appellee's corporate opportunity by an unauthorized dissemination
20 of the Business Plan and by obtaining tickets to the Fiesta Bowl,
21 purchased on Appellee's corporate credit card, and that Appellant
22 had obtained the tickets for his own personal use. Appellant
23 answered the Complaint.

24

25

26 ²Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
enacted and promulgated prior to the effective dates of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 On August 15, 2005, the bankruptcy court conducted a trial on
2 the merits of the Complaint including whether compensatory damages
3 should be awarded. Greco testified that an accounting was
4 provided to the Scottsdale Justice Court and that Appellant was
5 paid everything but the \$5,000.³ In a Memorandum Decision dated
6 February 21, 2006, the bankruptcy court found Appellant converted
7 Appellee's property when "he obtained [the Fiesta Bowl] tickets
8 post-petition and used those tickets personally without
9 reimbursement to [Appellee]." Memo. Dec. 2/21/06 at p. 10.
10 Although causes of action for turnover under §§ 542 and 543 were
11 not pled in the Complaint, pursuant to those Code sections, the
12 court ordered Appellant to turnover the value of the tickets in
13 the amount of \$5,500 plus interest from June 30, 2002, to
14 Appellee. Since Appellant had not turned over the tickets, the
15 court held that he was liable to the bankruptcy estate for
16 conversion of the Fiesta Bowl tickets in the amount of \$5,500 plus
17 interest from June 2002 until paid in full.

18 The bankruptcy court also found that Appellant committed a
19 defalcation while acting as a fiduciary. The court stated that
20 since Appellant had been the general manager, the nature of his
21 relationship with Appellee imposed a fiduciary duty upon him and
22 that he breached that duty by stating that he intended to destroy
23 an aspect of Appellee, by causing cash flow problems for Appellee,
24 and by circulating proprietary information to friends and family
25 without proper authorization from the Board of Directors.

26
27 ³Although Greco testified that Appellant was paid everything
28 but \$5,000, he likely meant \$5,500 because he was referring to the
charge Appellant made on Appellee's credit card for the tickets.

1 However, the bankruptcy court was unable to determine that damages
2 resulted from Appellant's breach of fiduciary duty.

3 Instead, the bankruptcy court stated that it had "already
4 determined that [Appellant] converted the Fiesta Bowl tickets with
5 a value of \$5,500, for his own use. The Court may certainly use
6 those damages as a basis to reflect damages for a breach of
7 fiduciary duty." Memo. Dec. 2/21/06 at p. 14. The court held
8 that "whether [Appellant] converted those tickets, or breached his
9 fiduciary duty to [Appellee], he is responsible to return the sum
10 of \$5,500, plus interest, to [Appellee] as compensatory damages."
11 Memo. Dec. 2/21/06 at p. 14. The bankruptcy court found that
12 Appellant "took control of the tickets post-petition, with no
13 authority to do so, since he was no longer employed by [Appellee],
14 gave the tickets away and/or sold the tickets with no Court
15 authority to do so, and then kept the proceeds he received."
16 Memo. Dec. 2/21/06 at p. 6. As to Appellee's claim of usurpation
17 of a corporate opportunity, the bankruptcy court did not find a
18 basis to support this claim.

19 The bankruptcy court concluded that Appellant's conduct was
20 committed with express or implied malice towards Appellee and set
21 a subsequent hearing to assess punitive damages; Nevada law
22 permits the recovery of punitive damages for a breach of fiduciary
23 duty. The court also left for the subsequent hearing the
24 determination of whether Appellant was entitled to a claim for
25 unpaid wages, the amount of said claim, and whether he was
26 entitled to set off or recoup that claim against any damages
27 awarded to Appellee.

28

1 On May 9, 2006, the bankruptcy court conducted a hearing to
2 resolve Appellant's Motion for Relief from Judgment, where
3 Appellant argued that there were no compensatory damages and
4 therefore there could be no punitive damages. The court
5 repeatedly stated that the award of actual or compensatory damages
6 was based on two theories: conversion and breach of fiduciary
7 duty, and that even if the \$5,500 for that breach was repaid as
8 part of the funds taken out of Appellant's salary, there was still
9 interest on that claim that was not paid, whether it was in the
10 amount of \$1.98 or \$20 or \$30. Tr. 5/9/06 at p. 13. The court
11 denied the Motion for Relief from Judgment.

12 On May 23, 2006, the bankruptcy court held an evidentiary
13 hearing on the wage claim and punitive damages. On June 28, 2006,
14 the trial on the punitive damages claim was concluded.⁴

15 The decision from this latter hearing is embodied in a
16 Memorandum Decision dated September 22, 2006. The bankruptcy
17 court found that Appellant "was still acting improperly although a
18 fiduciary, with no adequate controls in place, at his new
19 [c]ompany." Memo. Dec. 9/22/06 at p. 4. The court reiterated
20 Appellant's conduct that resulted in the finding that he breached
21 his fiduciary duty and found that all the factors for assessing
22 punitive damages were met - his conduct was reprehensible,
23 Appellant's conduct was recidivist, and that the potential harm to
24 Appellee was high. The court held that a multiple of four times
25 the actual damages (\$5,500) was reasonable and assessed \$22,000 in
26 punitive damages against Appellant. The bankruptcy court

27
28 ⁴The parties failed to provide us with a transcript of the
punitive damages hearing.

1 addressed Appellant's choice of law argument and found that the
2 state of incorporation, Nevada, provided the law that must be used
3 in assessing whether there was a breach of fiduciary duty. The
4 court then concluded by stating that it shall continue to apply
5 the law of Nevada to this controversy.

6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
8 We have jurisdiction under 28 U.S.C. § 158(a)(1).

9 **III. ISSUES**

10 The following are the issues on appeal:

11 1. Whether the bankruptcy court erred in determining that
12 compensatory damages should be awarded to Appellee.

13 2. Whether the bankruptcy court erred in awarding punitive
14 damages against Appellant.

15 3. Whether the bankruptcy court erred when it ignored
16 Appellee's and its attorney's knowing failure to list Appellant as
17 a creditor of the bankruptcy estate and knowing failure to give
18 Appellant notice of important dates and deadlines.

19 **IV. STANDARD OF REVIEW**

20 The standard of review for legal questions is de novo and
21 clearly erroneous for factual findings. Ting v. Chang (In re
22 Chang), 163 F.3d 1138, 1140 (9th Cir. 1998) (citing In re Bammer,
23 131 F.3d 788, 792 (9th Cir. 1992) (en banc)); Goichman v. Bloom (In
24 re Bloom), 875 F.2d 224, 226 (9th Cir. 1989) (citing Joseph F.
25 Sanson Inv. Co. v. 268 Ltd. (In re 268 Ltd.), 789 F.2d 674, 677
26 (9th Cir. 1986)). Punitive damages are reviewed for abuse of
27 discretion. Smith's Food & Drug Cntrs., Inc. v. Bellegrade, 958
28 P.2d 1208, 1211 (Nev. 1998).

1 P.2d 473 (Nev. 1975). The elements of breach of fiduciary duty
2 are (1) the existence of a fiduciary relationship; (2) breach of
3 that duty; and (3) damages proximately caused by such a breach.
4 Cascade Invs., Inc. v. Bank of Am., N.A., CV-N-99-559-ECR (RAM),
5 2000 U.S. Dist. LEXIS 21474, at *7 (D. Nev. Sept. 29, 2000)
6 (citing Fid. & Deposit Co. v. Curtis Day, No. C-92-1714 THE, 1993
7 U.S. Dist. LEXIS 5725, at *16 (N.D. Cal. Apr. 22, 1993).

8 **1. Fiduciary relationship**

9 Nevada courts have recognized fiduciary relationships formed
10 by employment, bailment, insurance, and partnerships. Cascade
11 Invs., Inc. v. Bank of Am., N.A., CV-N-99-559-ECR (RAM), 2000 U.S.
12 Dist. LEXIS 21474, at *3 (D. Nev. Sept. 29, 2000) (citing A.C.
13 Shaw Constr. v. Washoe County, 784 P.2d 9 (Nev. 1989). "A
14 fiduciary relationship exists when one has the right to expect
15 trust and confidence in the integrity and fidelity of another."
16 Powers v. United Servs. Auto. Ass'n, 962 P.2d 596, 602 (Nev.
17 1998).

18 Here, there is no dispute that Appellant and Appellee had a
19 fiduciary relationship. In 2002, Appellant served as a general
20 sales manager for Appellee. The bankruptcy court found that since
21 Appellant was the general manager, the nature of his relationship
22 with Appellee imposed a fiduciary duty upon him. Thus, we
23 conclude the bankruptcy court did not err in finding a fiduciary
24 relationship.

25 **2. Breach of that duty**

26 There is no dispute that Appellant breached his fiduciary
27 duty. The bankruptcy court held that Appellant breached his
28 fiduciary duty by stating that he intended to destroy an aspect of

1 Appellee by causing cash flow problems for Appellee, and by
2 circulating proprietary information to friends and family without
3 proper authorization from the Board of Directors. Thus, we
4 conclude the bankruptcy court did not err in finding that
5 Appellant breached his fiduciary duty to Appellee.

6 **3. Damages proximately caused by the breach**

7 Once the breach of a fiduciary duty has been shown, damages
8 must be proven that result from the breach. Mort Wallin of Lake
9 Tahoe, Inc. v. Commercial Cabinet, Co., Inc., 784 P.2d 954, 955
10 (Nev. 1989). The bankruptcy court determined that Appellant
11 converted the Fiesta Bowl tickets with a value of \$5,500 and that
12 the court may use those damages as a basis to reflect damages for
13 a breach of fiduciary duty. This is where the bankruptcy court
14 erred.

15 Appellant argues that there were no actual damages and that
16 there is overwhelming evidence that Appellant did not owe the
17 \$5,500 to Appellee. Appellee argues that there is overwhelming
18 evidence that Appellant converted Appellee's property by
19 purchasing \$5,500 in Fiesta Bowl tickets and subsequently not
20 turning the tickets over to Appellee once the tickets were
21 received by Appellant post-petition. Appellee points out that the
22 bankruptcy court's award of damages of \$5,500 plus interest was
23 based on conversion as well as on the breach of fiduciary duty
24 claim. Appellee further states that, while Appellant had the
25 right to assert an offset to prove up his proof of claim, he
26 ultimately withdrew that claim.

1 may justly be required to pay the other the full value of the
2 chattel.'" Miller v. Hehlen, 104 P.3d 193, 203 (Ariz. App. 2005).
3 Here, the evidence does not show the elements of conversion have
4 been met, specifically the elements of intent and control over
5 property of another.

6 The record shows the bankruptcy court found Appellant liable
7 for conversion as the result of Appellant's failure to turn over
8 the Fiesta Bowl tickets to Appellee when they were received by
9 Appellant in December 2002 and Appellant's subsequent personal use
10 of the tickets. While Appellant's retention and use of the
11 tickets could be deemed an intentional act, Appellee did not want
12 the tickets and they were no longer property of Appellee at the
13 time the tickets were received and used by Appellant because
14 Appellee effectively sold the tickets to Appellant through its set
15 off.

16 Set off is defined as "the discharge or reduction of one
17 demand by an opposite one, and it has frequently been defined as a
18 cross claim, for which an action might be maintained." Am.
19 Smelting & Ref. Co. v. Swisshelm Gold & Silver Co., 160 P.2d 757,
20 760 (Ariz. 1945) ("Swisshelm") (quoting 47 Am.Jur., Setoff and
21 Counterclaim, § 3, p. 709). Arizona law provides that an employer
22 may withhold the wages of an employee for the purpose of
23 effectuating a set off.⁵

24
25 ⁵Arizona Revised Statutes ("Ariz. Rev. Stat.") § 23-352
26 (2007) states that an employer may withhold an employee's wages if
27 there is a reasonable good faith dispute as to the amount of wages
28 due, including any claim of debt, reimbursement, recoupment or
set-off. Specifically, Ariz. Rev. Stat. § 23-352 (2007) provides

(continued...)

1 In July 2002, Appellee chose to set off the value of the
2 Fiesta Bowl tickets by withholding funds from Appellant's final
3 three direct deposits, all dated July 26, 2002, in the total
4 amount of \$5,500. The reason for the decision by Appellee to set
5 off this amount is not established by the record. Therefore, it
6 cannot be determined whether Appellee considered that Appellant's
7 credit card charge for the tickets was not authorized or whether
8 Appellee anticipated that it would not have a use for the tickets
9 five months later, in December, due to its own situation, i.e.,
10 the possibility of a sale of or bankruptcy filing for Appellee's
11 business. Nevertheless, the record shows that both Appellant and
12 Appellee recognize that the set off constituted a satisfaction of
13

14 ⁵(...continued)

15 No employer may withhold or divert any portion
16 of an employee's wages unless one of the
following applies:

17 1. The employer is required or empowered to do
18 so by state or federal law.

19 2. The employer has prior written
authorization from the employee.

20 3. There is a reasonable good faith dispute as
21 to the amount of wages due, including the
22 amount of any counterclaim or any claim of
debt, reimbursement, recoupment or set-off
asserted by the employer against the employee.

23 Ariz. Rev. Stat. § 23-350 (2007) defines wages as

24 nondiscretionary compensation due an employee in
25 return for labor or services rendered by an
26 employee for which the employee has a reasonable
expectation to be paid whether determined by a
27 time, task, piece, commission or other method of
calculation. Wages include sick pay, vacation
28 pay, severance pay, commissions, bonuses and
other amounts promised when the employer has a
policy or a practice of making such payments.

1 any amount owed to Appellee for the purchase of the Fiesta Bowl
2 tickets. The testimony by Greco on behalf of Appellee included
3 statements admitting that Appellant's final compensation was
4 reduced by the amount paid for the tickets. In addition, the
5 record includes a letter from Greco and evidence of three direct
6 deposit stubs showing that \$5,500 was withheld from Appellant's
7 final compensation for the Fiesta Bowl tickets. The fact that
8 Appellee failed to list Appellant as a creditor in its bankruptcy
9 case also tends to show that Appellee believed it was fully repaid
10 for the tickets.

11 Thus, through the set off, Appellee essentially sold the
12 tickets to Appellant. Consequently, the tickets became
13 Appellant's property in July 2002 as a result of the withholding
14 of the \$5,500 from Appellant's final compensation.

15 It is clear that one cannot convert his own property. See
16 Miller v. Hehlen, 104 P.3d at 203 ("Conversion also requires
17 conduct intended to affect property of another."); Shartzler v.
18 Ulmer, 333 P.2d 1084, 1088 (Ariz. 1959) ("It is settled that
19 conversion is any act of dominion wrongfully exerted over
20 another's personal property in denial of or inconsistent with his
21 rights therein." (quoting Gruber v. Pac. States Sav. & Loan Co.,
22 88 P.2d 137, 139 (Cal. 1939))). Because the Fiesta Bowl tickets
23 were no longer property of Appellee when Appellant used them,
24 Appellant cannot be liable to Appellee for conversion.

25 Similarly, although not addressed by either Appellee or the
26 bankruptcy court, liability for conversion cannot be found based
27 on the credit card charge in June 2002 for the Fiesta Bowl
28 tickets. It is not clear from the record whether Appellant was

1 authorized to order the tickets, and the record does not show that
2 Appellant purchased the tickets with the intent to use them for
3 his personal use or gain, rather than for a legitimate corporate
4 purpose, such as client development or solicitation of investors.
5 Intent is a necessary element for the tort of conversion. "The
6 intent required is 'an intent to exercise a dominion or control
7 over the goods which is in fact inconsistent with the plaintiff's
8 rights.'" Miller v. Hehlen, 104 P.3d at 203 (quoting Sterling
9 Boat Co. v. Ariz. Marine, Inc., 653 P.2d 703, 706 (Ariz. App.
10 1982) (quoting William Prosser, Handbook on the Law of Torts § 15,
11 at 83 (4th ed. 1971))). Because nothing in the record shows that
12 Appellant originally obligated Appellee to purchase the tickets
13 for other than corporate purposes, or "inconsistent with
14 [Appellee's] rights," Appellant cannot be liable for conversion
15 based upon the purchase of the Fiesta Bowl tickets. As a result,
16 the bankruptcy court erred in finding damages resulting from a
17 purported conversion.

18 **b. The bankruptcy court did not find damages based on breach of**
19 **fiduciary duty**

20 The bankruptcy court stated that it could not find damages
21 for breach of fiduciary duty based upon Appellant's dissemination
22 of the Business Plan or the alleged intent to destroy an aspect of
23 Appellee's business. The only basis on which the court found
24 damages in favor of Appellee was the purported conversion of the
25 Fiesta Bowl tickets by Appellant. Accordingly, because the
26 bankruptcy court found that no other damages were demonstrated for
27 breach of fiduciary duty, the court erred in finding actual or
28 compensatory damages.

1 **c. There were no damages as a result of Appellee's set off**

2 The bankruptcy court committed clear error in finding damages
3 owing to Appellee based on the value of the Fiesta Bowl tickets
4 because, at the time Appellee filed its Complaint against
5 Appellant, no damages based on the purchase of the tickets could
6 be claimed, as Appellee was made whole through its use of the
7 remedy of set off. By withholding \$5,500 from Appellant's final
8 compensation, Appellee was wholly repaid for the value of the
9 tickets.

10 More importantly, by Appellee's choice to utilize the self-
11 help remedy of set off, Appellee waived its right to assert a
12 cause of action and claim damages based on the transaction giving
13 rise to the set off.⁶ The Supreme Court of Arizona has recognized
14 "the defense of payment" in the situation of a set off, and held
15 that the original owner of converted property "may either
16 acquiesce in the conversion and [seek a remedy such as set off],
17 or refuse to acquiesce therein and ask for damages for the
18 conversion." Swisshelm, 160 P.2d at 760. In the Swisshelm case,
19 an employee of Swisshelm converted ore and other property
20 belonging to Swisshelm, some of which was sold to a third party.
21 Id. at 758. At a trial on a claim brought by the employee for
22 unpaid wages, Swisshelm stated that the wages were withheld as set
23 off for the property taken by the employee. Id. at 758. The
24 trial court essentially approved the set off in its findings of
25 fact by stating that the employee received far more from the
26 property than the claim for unpaid wages, and entered judgment in

27 ⁶As mentioned above, Appellee did not assert a cause of
28 action against Appellant based on the purchase of the Fiesta Bowl
tickets. However, because this transaction was the basis for the
bankruptcy court's finding of damages, this memorandum discusses
the legality and propriety under Arizona law of this finding.

1 favor of Swisshelm. Id. at 758. Swisshelm later sued the third
2 party who purchased the ore from the employee for the value
3 thereof. Id. at 757. The Arizona Supreme Court stated that
4 Swisshelm was precluded from asserting a claim against the third
5 party by virtue of its decision to set off the value of the ore.
6 Id. at 760 ("In adopting this position, Swisshelm may be said to
7 have waived the tort [of conversion]. By so doing it approved of
8 the sale and ratified the payment by the [third party] to [the
9 employee].") The Arizona Supreme Court held that "Swisshelm
10 waived the tort [of conversion] and proceeded in *assumpsit* by way
11 of setoff. . ." Id. at 760.

12 Similarly, in this case, Appellee had the option to sue
13 Appellant for the value of the Fiesta Bowl tickets on the ground
14 of conversion. Appellee chose not to do so. Rather, Appellee
15 asserted its right under the Arizona statute to set off the value
16 of the tickets from Appellant's wages. At that point, Appellee
17 was made whole and waived its right to later assert a claim based
18 on an alleged debt owing for the tickets, such as a claim for
19 conversion.

20 The bankruptcy court acknowledged the possibility of a set
21 off of the value of the Fiesta Bowl tickets. However, the court
22 went on to find that, even if the principal value of the tickets
23 were repaid through the set off, any damages resulting from
24 interest owing were sufficient compensatory damages to justify
25 judgment in favor of Appellee and the award of punitive damages.

26 **d. The bankruptcy court erred in finding interest as damages**

27 The bankruptcy court repeatedly stated that even if the
28 \$5,500 were repaid as part of the funds taken out of Appellant's

1 salary, there was still interest on that claim that was not paid,
2 whether it was in the amount of \$1.98 or \$20 or \$30.

3 As part of a judgment, a court may award interest on any debt
4 or liability demonstrated on the part of the defendant. Under
5 Arizona law, a debt is defined as a promise to pay.⁷ In this
6 case, there is no evidence that Appellant ordered the tickets for
7 his own use, rather than for corporate purposes. Consequently, no
8 showing has been made that Appellant made an express or implied
9 promise to Appellee to repay the amount charged to Appellee's
10 credit card for the purchase of the tickets. Therefore, no debt
11 arose with respect to the purchase of the tickets by virtue of any
12 promise to repay.

13 Debt can also arise based on a party's liability under a
14 legal cause of action, such as an action under a breach of
15 contract or tort. The debt in such a situation arises at the time
16 liability is imposed. According to Arizona law, liability is
17 imposed the "instant. . .the wrong was done." Kain v. Ariz.
18 Copper Co., 133 P. 412, 415 (Ariz. 1913) ("[T]he liability arises
19 immediately upon such breach of contract or disregard of duty, and

20 ⁷The Arizona Supreme Court defined debt as follows:

21 The word 'debt' is as applicable to a sum of
22 money promised at a future day as to a sum now
23 due and payable; the former is a debt owing; the
24 latter, a debt due. Anderson's Law Dictionary,
25 315. A sum of money which is payable is a debt,
26 'without regard to the fact whether it be
payable now or at a future time.' The money
need not be immediately payable; obligations yet
to become due constitute indebtedness, as well
as those already due. 'A party becomes indebted
when he enters into an obligation to pay.'

27 City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr.
28 Ass'n, Inc., 408 P.2d 818, 831 (Ariz. 1965) (internal citations
omitted).

1 an action to recover the damages, which are the measure of such
2 liability, may be immediately maintained." (quoting Lattin v.
3 Gillette, 30 P. 545, 546 (Cal. 1892))). Accordingly, a judgment
4 may award interest against a defendant from the moment liability
5 arises against him. However, logically, interest cannot be
6 awarded as damages absent a determination that the defendant is
7 liable under the claimed cause of action in the first place.

8 Here, the bankruptcy court awarded interest on the principal
9 award of damages in the amount of \$5,500, which was based on the
10 court's finding that Appellant converted Appellee's property.
11 Because the court erred in awarding damages against Appellant for
12 conversion, the award of interest on such damages cannot be
13 affirmed. Further, because the bankruptcy court did not find
14 damages against Appellant on any other grounds for breach of
15 fiduciary duty, there exists no basis whatsoever for an award of
16 interest in this case.

17 In conclusion, because damages must be shown as an element of
18 a claim for breach of fiduciary duty, and because Appellee failed
19 to demonstrate any damages, the bankruptcy court erred in
20 rendering judgment against Appellant and in favor of Appellee.
21 The court found no damages shown under any allegations of breach
22 of fiduciary duty, other than those based on an alleged act of
23 conversion. However, the bankruptcy court erred in finding
24 conversion where it was not sufficiently pled or demonstrated
25 through evidence. Moreover, Appellee waived any claim for
26 conversion through its decision to set off the charge for the
27 tickets. Finally, because there are no underlying damages or
28 liability owing from Appellant to Appellee, no interest could have

1 accrued that would justify an award of compensatory damages based
2 on any interest. Thus, we conclude the bankruptcy court erred in
3 finding actual or compensatory damages.

4 **B. Punitive Damages**

5 Appellant argues that the bankruptcy court erred in awarding
6 punitive damages. Appellant cites to State Farm Mutual Auto. Ins.
7 Co. v. Campbell, 538 U.S. 408, 416 (2003) for the proposition that
8 should the court determine punitive damages, the court must do so
9 without violating Appellant's due process rights. Without citing
10 any authority, Appellant argues that if the action for breach of
11 fiduciary duty took place in a state other than where the entity
12 was incorporated, the court has to apply the law where the act
13 occurred, which in this case would be Arizona, and in Arizona,
14 punitive damages cannot be awarded absent actual damages.

15 Appellant asserts that he does not owe Appellee \$5,500, that there
16 has been no harm to Appellee because Appellee kept Appellant's
17 funds and has been paid for the Fiesta Bowl tickets, that Appellee
18 failed to prove any actual damages, and that the bankruptcy court
19 did not find any actual damages based on Appellant's conduct.

20 Appellee argues that since Appellee was incorporated in
21 Nevada, Nevada law applies. Appellee states that there was ample
22 evidence to justify an award of punitive damages - that Appellant
23 intended to injure Appellee by converting estate assets for his
24 own personal use and to disseminate Appellee's proprietary
25 information to others without any authorization. Appellee argues
26 that Appellant presented no evidence to the contrary that his
27 conduct qualified as express malice, since he had the ability and
28 intent to destroy Appellee. Appellee also states that Appellant's

1 conduct had not changed, so the amount of punitive damages was
2 appropriate to punish and deter him. Appellee argues that given
3 the fact that it sought the statutory maximum of \$300,000 in
4 punitive damages but was awarded only \$22,000, or four times the
5 actual damages, the punitive damages award was well within the
6 statutory restrictions, so this award must be upheld.

7 Nevada Revised Statutes ("Nev. Rev. Stat.") § 42.005 (2007)
8 provides for an award of punitive damages upon a showing of fraud,
9 oppression or malice by clear and convincing evidence.

10 Specifically, it states

11 1. Except as otherwise provided in N.R.S.
12 42.007, in an action for the breach of an
13 obligation not arising from contract, where it
14 is proven by clear and convincing evidence that
15 the defendant has been guilty of oppression,
16 fraud or malice, express or implied, the
17 plaintiff, in addition to the compensatory
damages, may recover damages for the sake of
example and by way of punishing the defendant.
Except as otherwise provided in this section or
by specific statute, an award of exemplary or
punitive damages made pursuant to this section
may not exceed:

18 (a) Three times the amount of compensatory
19 damages awarded to the plaintiff if the amount
of compensatory damages is \$100,000 or more; or

20 (b) Three hundred thousand dollars if the amount
21 of compensatory damages awarded to the plaintiff
22 is less than \$100,000.

23 Punitive damages may be assessed for breach of fiduciary duty.
24 Clark v. Lubritz, 944 P.2d 861, 867 (Nev. 1997).

25 Both the states of Nevada and Arizona require that there
26 first be an award of actual or compensatory damages before
27 punitive damages may be awarded. Sprouse v. Wentz, 781 P.2d 1136,
28 1138 (Nev. 1989) ("Compensatory damages must be awarded before the

1 court can award punitive damages."); Wyatt v. Wehmueller, 806 P.2d
2 870, 874 (Ariz. 1991) ("A plaintiff must be entitled to actual
3 damages before being entitled to punitive damages.")

4 As stated above, Appellee did not show that it had suffered
5 any actual or compensatory damages. Because punitive damages
6 cannot be awarded absent actual damages, Appellee is not entitled
7 to punitive damages. We conclude the bankruptcy court abused its
8 discretion on this issue.

9 **C. Failure to list Appellant as a creditor**

10 Appellant argues that the bankruptcy court erred when it
11 ignored Appellee's and its attorney's knowing failure to list
12 Appellant as a creditor of the bankruptcy estate and knowing
13 failure to give Appellant notice of important dates and deadlines.
14 Appellant asserts that although the bankruptcy judge stated that
15 she was unhappy with the parties, she never rebuked or censured
16 Appellee for failing to reveal to the court that \$5,500 was not
17 due and owing to the estate and that the court forced Appellant to
18 withdraw his proof of claim but failed to give any basis for an
19 award of interest.

20 This argument provides no basis whatsoever for reversing the
21 bankruptcy court's ruling. The record simply does not show that
22 the bankruptcy court forced Appellant to withdraw his proof of
23 claim or that Appellant was entitled to any monies from the
24 estate.

25 **VI. CONCLUSION**

26 The bankruptcy court found that the only actual or
27 compensatory damages due from Appellant were the \$5,500 charge
28 used to purchase the Fiesta Bowl tickets and interest from June

1 2002. Appellee lawfully offset the full amount of this charge
2 against the final compensation due Appellant. The bankruptcy
3 court erred in finding a conversion and any damages resulting from
4 the purported conversion. There was no other determination of
5 compensatory damages based on the breach of fiduciary duty alone.
6 Because there are no underlying damages, no interest could have
7 accrued. Therefore, the bankruptcy court erred in awarding
8 compensatory damages. Since punitive damages cannot be awarded in
9 the absence of compensatory damages, Appellee is also not entitled
10 to punitive damages. We **REVERSE** the order of the bankruptcy
11 court.